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Robin M. Davis

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I. Introduction

For the past forty-seven years you have gone to the same church[1] every Sunday. It has become a part of you. You were married in this church twenty-five years ago. Your children were baptized there, and it is where you attend weekly services with friends and family. As you arrive this week, no different than any other week, you find shocking news. The doors are locked and a sign reads, *"CHURCH CONDEMNED. WAL-MART SUPERCENTER STORE COMING SOON!"*

You are disgusted. This institution was your sanctuary for religious worship for nearly fifty years. You have participated in mission assignments, held community fairs, hosted vacation bible schools, and played in the softball league. Now suddenly, the church is no more. Surprised parishioners gather around the sign with you. The pastor explains that the church property was seized through eminent domain and there is nothing he can do. Apparently, the church was condemned by the local borough council and subsequently transferred to a private corporation for economic development. The pastor promises to work quickly towards securing a new site, but cannot make any promises regarding future locations or when the church will reopen.

You are devastated, but also furious. You do not understand. Since

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2007; B.A. Political Science, *cum laude*, The College of New Jersey, 2004.

1. Church property owned by a religious organization is used solely as an example for purposes of this argument; please note that the author respects all religious denominations and acknowledges that this problem could occur to any tract of land owned and used by any religious organization.

when can the government seize land to build a Wal-Mart? You feel as though the local borough council has violated your First Amendment right to religious freedom via state eminent domain laws. Can Wal-Mart, or any other "big-box" retailer, now violate your constitutional freedoms?

On June 23, 2005, the United States Supreme Court decided *Kelo v. City of New London*[2] and dramatically expanded the concept of "public use" as defined by the Takings Clause of the Fifth Amendment of the Constitution.[3] In her dissenting opinion, Justice O'Connor brought this issue to light and criticized the majority for jeopardizing citizens' constitutionally-protected religious rights.[4]

Justice O'Connor remarked that "[u]nder the banner of economic development, *all private property is now vulnerable* to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public. . . ."[5] This result begs the question: what is the *better* "public use" of land? This inquiry becomes increasingly difficult when the land is owned by a religious organization, used by the public for religious worship, and the consequential taking would transform the land into private, economically developed property, such as a retail store.

The purpose of this Comment is to highlight the constitutional vulnerabilities that *Kelo v. City of New London* has produced. Part II of this Comment will explain the *Kelo* decision and how it jeopardizes the First Amendment right to freedom of religion. Part III-A discusses the constitutional tug-of-war between the First and Fifth Amendments that will occur as a result of *Kelo*. Part III-B demonstrates how states interpret the concept of "best public use." Part III-C focuses on the problems states incur when economic agendas are involved in eminent domain proceedings.

Next, Part III-D explains the abuses that have arisen from the Supreme Court's recent decisions defining "public use." Part III-E describes how states currently take either a conservative or liberal

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2. Kelo v. City of New London, 125 S. Ct. 2655 (2005) (5-4 decision holding that a city's exercise of eminent domain power in furtherance of an economic redevelopment plan satisfied the constitutional requirement of "public use").

3. *See id.* at 2668.

4. *See id.* at 2672 (O'Connor, J., dissenting):

> While the government may take their homes to build a road or a railroad or to eliminate a property use that harms the public, say petitioners, it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.

Id. (O'Connor, J., dissenting).

5. *Id.* at 2671 (O'Connor, J., dissenting) (emphasis added).

interpretation of the words "public use" regarding the condemnation of land used by religious organizations. Finally, Part III-F sets the stage for future discussions of what will come in a post-*Kelo* nation. This section argues that in response to this decision, state legislatures must prevent condemnation of religiously-used lands in order to preserve First Amendment freedoms. Part IV concludes by proposing a beneficial and realistic path that state legislatures should take to ensure that the Constitution is upheld and that citizens' rights are protected.

II. Background

A. Defining "Public Use"

Traditionally, eminent domain referred to the government's ability to take land from private parties and convert the land into a public use.[6] Through eminent domain powers conferred by the Takings Clause of the Fifth Amendment, the Constitution specifically allows both federal and state governments to take private property.[7] The Takings Clause states, "nor shall private property be taken for public use, without just compensation."[8] To satisfy the Takings Clause, a taking must satisfy two requirements.[9] The first is that land can only be taken for "public use";[10] the second is that just compensation be paid for the land.[11]

The Constitution only establishes the parameters for eminent domain laws. State legislatures are given the responsibility of enacting eminent domain laws and enumerating the state's specific powers and scope.[12] Although the legislative branch determines the discretion and

6. *See* J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n, 792 A.2d 288, 297 (Md. 2002) ("[e]minent domain, in its simplest terms, is the 'inherent power of a governmental entity to take privately owned property . . . and convert it to public use. . . .'" (citing BLACK'S LAW DICTIONARY 541 (7th ed. 1999)).

7. *See* U.S. CONST. amend. V. The Fifth Amendment is extended by the Fourteenth Amendment to the states. *See* U.S. CONST. amend. XIV, § 1. *See also, e.g.,* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 228 (1897).

8. *See* U.S. CONST. amend. V.

9. *See id.*

10. *See id.*

11. *See id.* The constitutional requirement of "just compensation" is not at issue for purposes of this Comment. Of course, if religious land is constitutionally condemned under the Takings Clause, a price must be paid for the land. The sole purpose of this Comment, however, is to argue that seizures and transfers of religious land for private economic development are unconstitutional.

12. *See* City of Tahlequah v. Lake Region Elec., Co-op, Inc., 47 P.3d 467, 471 (Okla. 2002) ("[t]he power of condemnation lies dormant within the State until such time as the Legislature by specific enactment delineates the manner and through whom it may be exercised.").

power vested in eminent domain laws,[13] the judiciary is still the final judge of whether the taking sufficiently satisfies the "public use" requirement.[14]

Currently, the Supreme Court identifies three categories of takings that comply with the "public use" requirement.[15] The first category allows the government to transfer private property to public ownership,[16] such as public roads, highways, and hospitals.[17] The second category allows the government to transfer private property to private parties, who then make the property available for the public's use.[18] This second category of transfers includes railroads, public utilities, and stadiums.[19] Recently, the Supreme Court acknowledged that the terms "public ownership" and "use-by-the-public" are sometimes too constricting,[20] making it impractical[21] to classify the scope of the Public Use Clause into two categories.

Therefore, the Court created a third category which allows private property to be seized by the government and then transferred for another's private use. The Court intentionally interpreted the Takings Clause to allow "that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use."[22]

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13. *See* Utilities, Inc. of Md. v. Wash. Suburban Sanitary Comm'n, 763 A.2d 129, 133-34 (Md. 2000).

14. *See* Cincinnati v. Vester, 281 U.S. 439, 446 (1930) ("[i]t is well established that . . . the question [of] what is a public use is a judicial one.").

15. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting).

16. *See id.*

17. *See id.*; *see, e.g.*, Old Dominion Land Co. v. United States, 269 U.S. 55 (1925) (military purposes); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) (highways).

18. *See Kelo*, 125 S. Ct. at 2655.

19. *See id. See also, e.g.*, Nat'l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407 (1992) (railroads); Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30 (1916) (public water power).

20. *See Kelo*, 125 S. Ct. at 2655.

21. *See id.* at 2662:

> Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (e.g., what proportion of the public need to have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society.

Id.

22. *Id.* at 2673 (O'Connor, J. dissenting); *see, e.g.*, Berman v. Parker, 348 U.S. 26, 28 (1954) (holding that the constitutional requirement under the Takings Clause "for public use" authorizes aesthetic considerations as well as considerations of health); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241-42 (1984) (extending *Berman*, holding that

The Supreme Court adopted its interpretation of "public use" from its broad holding in *Fallbrook Irrigation District v. Bradley*.[23] In *Fallbrook Irrigation*, the Court held that a broader application of the term "public use" as a "public purpose" should be implemented.[24] However, the *Kelo* majority endorsed an even more expansive interpretation of *Fallbrook Irrigation's* "public purpose."[25]

B. Recent Developments—Kelo v. City of New London

In *Kelo*, the Supreme Court analyzed the constitutionality of Connecticut's legislatively-imposed eminent domain power to take private land for economic redevelopment.[26] Connecticut has an eminent domain statute that authorizes the condemnation of private property for a subsequent transfer to a private entity for economic redevelopment.[27] In New London, Connecticut, a pharmaceutical company offered to buy a large tract of land from the city and redevelop it in order to stimulate the local economy.[28] The land mostly belonged to a vacant military facility, but the plan also involved the condemnation of several private properties.[29]

Although the general area was categorized as a distressed municipality[30] in need of economic revitalization, the land in dispute in

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condemnation of private property to weaken an oligopoly is a rational exercise of power under the Fifth Amendment).

23. *See Kelo*, 125 S. Ct. at 2657; Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

24. *See Fallbrook*, 164 U.S. at 158, 160-64.

25. *See Kelo*, 125 S. Ct. at 2657.

26. *Id.* at 2658.

27. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2665 (2005). *See also* CONN. GEN. STAT. ANN. § 8-186 (2005):

> It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in *distressed municipalities*, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

Id. (emphasis added).

28. *Kelo*, 125 S. Ct. at 2659.

29. *Id.*

30. *Id.* at 2658.

Kelo was well-maintained. It was not distressed or blighted.[31] However, the Court afforded Connecticut's statute extreme deference and affirmed the Supreme Court of Connecticut's decision that it satisfied the "public use" requirement because it was in the "public interest" to take the private land for economic redevelopment.[32]

Kelo effectively changed the disposition of land use by expanding the definition of "public use."[33] In *Kelo*, the majority held that the economic redevelopment plan set forth by the city of New London served a "public purpose,"[34] satisfying the "public use" requirement and the Takings Clause challenges.[35] Accordingly, the Supreme Court held that a city's exercise of eminent domain powers in furtherance of an economic development plan[36] satisfied the "public use" requirement under the Takings Clause of the Constitution.[37]

The Supreme Court left no guidance as to further restrictions on states' discretion. The Court stated:

> Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project .... Once the question of public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.[38]

The majority emphasized that its job was to set the floor, not the ceiling,

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31. *Id.* at 2660.

32. *See id.* (citing Kelo v. City of New London, 843 A.2d 500, 515-21 (Conn. 2004)).

33. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J. dissenting).

34. *See Review of Kelo v. New London Court Case on Eminent Domain: Capitol Hill Hearing Before the H. Comm. on Energy and Commerce & the H. Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. (2005) (statement of Michael D. Ramsey, Professor at Law, San Diego Law School) [hereinafter Ramsey]. Ramsey argues:

> The Court did not pretend to base its conclusion upon the text and historical understanding of the Constitution. Instead, it said that the evolving modern needs of society required that it substitute the phrase "public purpose" for the Constitution's phrase "public use"—so that the government could seize private land at any time that seizure would facilitate "economic development." As Justice O'Connor pointed out in her dissent, this effectively removes all constitutional limits on the eminent domain power.

Id.

35. *See Kelo*, 125 S. Ct. at 2665.

36. *Id.* ("[p]romoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from other public purposes we have recognized.").

37. *Id.*

38. *Id.* at 2668 (quoting Berman v. Parker, 348 U.S. 26, 35-36 (1954)).

for eminent domain guidelines[39] and rejected Justice O'Connor's dissenting opinion that land can be vulnerable.[40] The Court reiterated that individual states possess their own authority to implement limits and protections on the power of eminent domain and retain the ability to place further restrictions on land seizure policies.[41] These requirements can be established by state constitutional law[42] or in state eminent domain statutes setting limits on which takings can occur.[43]

C. Kelo's *Powerful Dissent*

In one of her most powerful dissents, Justice O'Connor contended that *Kelo* effectively deleted the words "public use" from the Takings Clause and dramatically altered the text of the Constitution.[44] She argued:

> To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.[45]

As Justice O'Connor argued, no longer do the words "public use" realistically exclude any type of taking, or exert any constraint on the takings power.[46] Justice O'Connor emphasized that the majority had dramatically expanded the "public use" standard to include economic concerns.[47] No longer is this term just for governmental necessity.[48] Now legislatures may deem an "economic upgrade" as sufficient to take

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39. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2668 (2005).

40. *See id.* (noting that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power . . . many states already impose 'public use' requirements that are stricter than the federal baseline.").

41. *See id.*

42. *Id.; see, e.g.,* County of Wayne v. Hathcock, 684 N.W.2d 765, 773 (Mich. 2004).

43. *See Kelo,* 125 S. Ct. at 2668. Under California law, for instance, a city may only take land for economic development purposes in blighted areas (CAL. HEALTH & SAFETY CODE §§ 33030-37 (West 1997)). *See, e.g.*, Redevelopment Agency of Chula Vista v. Rados Bros., 115 Cal. Rptr. 2d 234, 243 (Cal. 2002).

44. *See Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).

45. *Id.* (O'Connor, J., dissenting).

46. *See id.* at 2675 (O'Connor, J., dissenting).

47. *See id.* at 2671 (O'Connor, J., dissenting) (criticizing the majority for "abandon[ing] this long-held, basic limitation on government power.").

48. *Id.* (O'Connor, J., dissenting). According to Justice O'Connor, "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public[.]").

land away as long as there is just compensation.[49]

Justice O'Connor's dissent exposes the potential for infringement of First Amendment rights. Specifically, this danger lies with the susceptibility of governmental takings on land that is used by religious organizations for worship. In one simple and powerful line, Justice O'Connor stated, "any church . . . might be replaced with a retail store."[50] Justice O'Connor foreshadowed the potential abuses that the *Kelo* majority neglected to protect against.

Additionally, Justice O'Connor's dissent emphasized the historical importance of the Takings Clause's two requirements: for public use and just compensation.[51] These two requirements demonstrate not only the importance of the protections established by the Framers of the Constitution, but also the significance of the Constitution itself.[52] O'Connor continued by advocating that the two requirements of the Takings Clause "ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."[53]

The purpose behind the requirements of Takings Clause is to protect ownership and use of land.[54] If restraints on "public use" are eliminated, or expanded by the legislature beyond the control of property owners, the protections afforded by the Fifth Amendment will be effectively eradicated and unjust takings will occur.[55]

III. Analysis

Eminent domain cases typically carry the potential for abuse. However, this debate becomes particularly interesting post-*Kelo* when a dispute arises between economic development and preservation of the public's right to religious freedom through the use of land owned by a religious organization.

The *Kelo* opinion left significant questions unanswered. These questions include: (1) Can land owned and used for religious purposes

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49. *Id.* at 2675 (O'Connor, J., dissenting).

50. Kelo v. City of New London, 125 S. Ct. 2655, 2675 (2005) (O'Connor, J., dissenting).

51. *See id.* (O'Connor, J., dissenting).

52. *See Kelo,* 125 S. Ct. at 2677 (O'Connor, J., dissenting) (arguing that "the Founders cannot have intended this perverse result.").

53. *Id.* at 2672.

54. *See id.* (O'Connor, J., dissenting).

55. *See* Ramsey, *supra* note 34 ("[u]nder this very low standard, it is hard to imagine any seizure of private property being unconstitutional under the 'public use' requirement.").

be seized and transferred solely for private development?; and (2) Are there any protections afforded to land used by religious organizations solely for religious worship? Individual state legislatures must now answer these questions. However, disagreement exists among states regarding what exactly defines "public use," how "public use" should specifically be tested, and what constitutes the best "public use."

Currently, states are split on the exact definition of "public use."[56] Some states liberally interpret[57] what types of land are subject to eminent domain; whereas, other state legislatures restrict[58] what land can be subject to governmental takings. Thus far the Supreme Court holds that as long as the states do not violate federal or state constitutions, they are able to make individual determinations for their citizens.[59]

Thus, the question becomes how states should determine what constitutes the "best public use." Each state's legislature must address this exact issue through its own legislation. However, in order to ensure that both the Federal Constitution is upheld and the citizens' inherent, constitutional rights are protected, each state should place strict limits on the ability of its government to condemn property owned and used by religious organizations.[60]

A. A Constitutional Tug-of-War

The Supreme Court's decision to expand the concept of "public use" creates an inevitable battle between the First Amendment and the Fifth Amendment when the seizure of land in dispute is owned by a religious organization. The Bill of Rights[61] ensures Americans certain freedoms and protections. For example, the First Amendment specifically guarantees the freedom of religion.[62] Courts have vigorously upheld this important Amendment and its privileges since its enactment.[63] This Amendment is just one of the many defining and

56. *See* discussion *infra* Part III-B.

57. *See* discussion *infra* Part III-E-(2).

58. *See* discussion *infra* Part III-E-(1).

59. *See* discussion *infra* Part III-D.

60. *See* Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 654 (2004) [hereinafter Saxer].

61. U.S. CONST. amend. I-X.

62. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.") The First Amendment is applicable to the states through the Due Process Clause of Fourteenth Amendment. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 750 (1976).

63. *See, e.g.*, Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250, 1252 (Colo. 1973) (recognizing "the extraordinary importance of the rights and freedoms engraved in the foundation of our country by the First Amendment of the Bill of Rights. Of all the freedoms, freedom of worship may be the most precious to the spirit.").

characteristic freedoms that Americans enjoy on a daily basis.

The American population is not comprised of one single religion, but instead is a mix of many different and diverse religious groups. Freedom to pursue or not to pursue a religion is a fundamental right established by the Framers of the Constitution.[64]

Eminent domain is an important power for sovereign governments to possess.[65] Yet without strict regulations, eminent domain can also be potentially damaging and abusive. Governments must be cautious when invoking eminent domain powers due to the significant effect that takings of land have on society.

State legislatures have the primary responsibility of coordinating state eminent domain laws and consequently, they assume the duty and obligation to protect the rights of their citizens. Accordingly, states should seek to objectively determine what potential risks and abuses exist during takings. In addition, states should safeguard citizens against those risks and abuses. Legislatures need to draft standards and requirements for governmental takings, particularly for those which result in a subsequent transfer to a private entity.

The *Kelo* decision opened the door to permit governmental takings of land, used by individuals for religious purposes, for private purposes.[66] With this decision, the Supreme Court disregarded one of the most fundamental principles in America, the freedom of religion.[67] Inevitably, challenges will arise regarding the condemnation of a religious organization's property.

Consider the opening example. A local borough council condemns land containing a church owned by a Protestant religious organization. The land is currently being used solely by church parishioners for religious worship. The right to worship[68] freely is guaranteed to these parishioners by the First Amendment.[69] However, the council wants to enhance economic development for the community by transferring this

64. *See* U.S. CONST. amend. I.

65. *See* Press Release, Rep. Steve Chabot, Rep., United States Cong., Chabot Helps Push Property Rights Legislation Through Judiciary Committee, (Oct. 28, 2005) (on file with the States News Service) [hereinafter Chabot] ("[f]ew would question that the Constitution provides a legitimate role for eminent domain when the purpose is a true public use and the property owner receives just compensation. Properly used, eminent domain should give communities an option of last resort to complete the development of roads, schools, utilities and other essential public infrastructure projects.").

66. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting).

67. *See* Chabot, *supra* note 65.

68. *See* U.S. CONST. amend I. The Establishment Clause dictates that "Congress shall make no law respecting an establishment of religion. . . ."

69. *See id.* The Free Exercise Clause states that "Congress shall make no law . . . prohibiting the free exercise thereof."

tract of land to a private corporation, Wal-Mart, for future development of its signature Supercenter Store. The council seeks to impose state eminent domain laws to condemn the land for the transfer. In this straightforward scenario, citizen parishioners are actively exercising their religious freedoms, yet nothing prevents the council from taking their land.

In fact, the *Kelo* decision bestows upon government entities the power to seize land and transfer it to private developers for another "public use."[70] This "new public use" is interpreted by the legislature to be a "better public use." In this example, the governmental taking of land for subsequent private use can occur because the state legislature neglected to enact any additional protections to safeguard its parishioner citizens. Thus, without specific provisions to state constitutions and statutes, *Kelo* allows the local borough council to unjustly deem the Supercenter Store to be of better "public use" to the community. Both federal and state governments need to act to ensure that the rights of citizens are protected by balancing the interests of the Fifth Amendment against those rights afforded by the First Amendment.

B. State Interpretations of the Best "Public Use"

When the government wants to condemn religious land, the first line of defense that the religious organization can assert is that the tract of land in dispute is already serving a "public purpose." Land that is used by a religious organization, strictly for religious purposes, is already being used *by* the public.[71] Therefore, the religious organization will argue there is no justification for the condemnation because the first requirement of the Takings Clause, for "public use," is currently satisfied.[72]

What occurs instead is that one public use meets another conflicting public use. Therefore, when two competing public uses exist, states must determine what the "*better use*" of the land actually is, and whether the taking should occur. In this situation, an examination of both the state constitution and the state eminent domain statutes determines whether the taking is constitutional and which public use should prevail. For example, in the recurring hypothetical the question remains the same. Is it a "better public use" for the community to condemn a church and put in a Wal-Mart Supercenter Store, or is it a "better public use" to reject the condemnation and allow the parishioners to continue to freely

70. *See Kelo*, 125 S. Ct. at 2666.

71. Although every individual might not want to use the religious organization's land, the property is still "open" to the public.

72. *See* U.S. CONST. amend. V.

exercise their religious beliefs?

Accordingly, what exactly the *best* "public use" is becomes the debated question in communities. While the land is already being used by a religious organization to exercise their constitutional freedoms, a new retail store would also serve the public, but in an economic way.[73] Thus, it is up to the state legislatures to determine what the *best* "public use" of the land *should* be.[74] Laws regarding the condemnation and taking of private property vary from state to state.[75] Once a state determines constitutional eminent domain guidelines, it is neither the duty nor the desire of the federal government to impose further restraints on a state's individual power.[76]

Unfortunately, no exact or universal definition of "public use" exists among the states.[77] Therefore, it is up to each state to determine what should constitute "public use," and when disputes arise, what should constitute the legitimate "best use" of the land. What factors guide this debate is also disputed. Is the best "public use" that which gives the state more tax benefits? Is it the use that serves a larger percentage of the public?

State legislatures are given considerable deference in drawing the line between "public" and "private" use.[78] "An external, judicial check on how the public use requirement is interpreted, however limited, is necessary, if this constraint on government power is a judicial one."[79]

Any future economic redevelopment projects on current religiously-used land tracts should be deemed unconstitutional. Recall Justice O'Connor's dissent in *Kelo* where she states that the results produced can be absurd,[80] particularly when a "purportedly 'public purpose' taking meets the public use requirement."[81] For instance, "any single-family home . . . might be razed to make way for an apartment building, or any church . . . might be replaced with a retail store. . . ."[82]

The problem with the Court's decision in *Kelo* is that it does not adequately protect against abusive decision making which could

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73. *See* discussion *infra* Part III-C.

74. *See* J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n, 792 A.2d 288, 297-98 (Md. 2002).

75. *See* discussion *infra* Part III-E.

76. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2668 (2005).

77. *See, e.g.*, State *ex rel.* Tomasic v. Unified Gov't of Wyandotte County/Kan. City, Kan., 962 P.2d 543, 553 (Kan. 1998).

78. *See Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

79. *Id.* (O'Connor, J., dissenting); *see also* Cincinnati v. Vester, 281 U.S. 439, 446 (1930) ("[i]t is well established that . . . the question [of] what is a public use is a judicial one.").

80. *See Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting).

81. *Id.* at 2673 (O'Connor, J., dissenting).

82. *Id.* at 2675 (O'Connor, J., dissenting).

condemn land used for religious purposes. If a state legislature enacts a law providing that the better "public use" is the more economically efficient use, then certainly any religious organization's place of worship could be condemned. Churches, and other religious institutions, will contest that their property is already devoted to a "public use" and, therefore, that it should be exempt from condemnation. As a result of *Kelo's* shortcomings, and its failure to adequately protect religiously-used land against potential abuses, it is up to the individual states to protect citizens.

One way to avoid determining what the *best* "public use" is would be to have states exclude certain types of property. Only state legislatures can determine what property should be exempted.[83] Since property owned and used by a religious organization is already devoted to "public use" and facilitates individual rights to religious freedom, it should be exempt from condemnation.

C. *The Problem: Economic Agendas*

The United States is a nation which is not only recognized for its wealth, but also respected for it. Indisputably, economics play a vital role on national and state agendas. Every day important financial decisions are made, presumably for the improvement of the nation and states. However, when economic agendas are involved, the lines can become blurred when deciding what the "best public use" of land is. The *Kelo* decision blurs this fine line even further.

Kelo allows states to condemn property and transfer it for private, economic redevelopment.[84] The proposed economic development plan in the *Kelo* decision was built around the premise that the plan would generate new jobs and larger tax revenues for the locality.[85] This is the equivalent of saying that *Kelo* allows the government to take land if it can increase the tax base of the property.[86]

Returning to the opening example, when comparing churches with retail stores, the tax revenue factor alone could impact the decision because there are significant economic consequences based on who owns

83. *See* Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916) (stating that the legislature, in delegating authority, may except certain property from condemnation, so long as the classification is reasonable).

84. See *Kelo*, 125 S. Ct. at 2665.

85. *See* Todd Jackson, *Private-Keep Off; Eminent Domain: Aftershocks of Kelo v. City of New London*, THE ROANOKE TIMES, July 18, 2005, at A1.

86. *See* Charles B. Sheppard, *Eminent Domain Condemnation of Private Property for Private Use: Legitimate or a Land Grab?*, 44-SEP ORANGE COUNTY LAWY. 30, 30 (2002).

the property. All states authorize tax exemptions for church property,[87] as well as other property used solely for religious worship. Since the institution of the federal income tax, tax exemptions have always been provided for religious organizations.[88]

In *Walz v. Tax Commission of the City of New York*,[89] the Supreme Court held the "grant of a tax exemption [was] not a sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[90] The purpose behind this legislation was neither the advancement nor inhibition of religion,[91] nor was it to support or sponsor, but rather to limit the inherent dangers of the imposition of property taxes, such as failure to pay.[92] Therefore, it respected the principle of separation of church and state because there was no correlation between tax exemptions and the First Amendment's Establishment Clause.[93]

Property used solely for religious worship by various religious organizations is particularly vulnerable to seizure for the obvious reason that any big-box retailer, such as Wal-Mart, would pay property taxes, thereby, significantly increasing the tax base of the property. This possibility becomes particularly threatening to churches in areas that are thoroughly developed and do not possess available open space for new development. Here, land used for religious worship could easily be displaced for the construction of new stores.

Kelo stands for the proposition that economic enhancement, through private redevelopment, *is* "public use." This makes *any* property susceptible to taking, but particularly property used solely for religious purposes because it is tax-exempt. Thus, enlarging a community's tax base can now be seen as a constitutional "public use."

The tragedy of the *Kelo* decision is that the Supreme Court has construed the concept of "public use" differently from its original and intended use.[94] The Framers of the Constitution sought to protect against

87. *See* Walz v. Tax Comm. of the City of New York, 397 U.S. 664, 676 (1970) (noting that "all [fifty] states provide for tax exemption of places of worship, most of them doing so by constitutional guarantees.").

88. *See id.*

89. *Id.* at 664 (finding no violation of the First Amendment religious clauses in state taxation schemes which exempt property used solely for religious worship).

90. *Id.* at 675.

91. *See id.* at 672.

92. *See id.* at 704.

93. *See* Walz v. Tax Comm. of the City of N.Y., 397 U.S. 664, 675 (1970). *See also id.* at 676 (explaining that "the exemption creates only a minimal and remote involvement between church and state far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.").

94. *See* Ramsey, *supra* note 34:

these specific abuses.[95] Specifically, the Framers sought to prevent the seizure of land to increase the tax base.[96] Takings of religiously-used lands for economic redevelopment projects are abusive and need to be halted.

D. A Trend Leading to Abuse: Prior Supreme Court Rulings

Historically, courts took a restrictive view of the power of eminent domain because it encroaches on the right to acquire and possess property. Progressively, however, this view changed.[97] Instead of serving a governmental purpose for a road, park or common carrier, the Supreme Court increasingly expanded its interpretation of the words "public use"[98] to now mean for "any public purpose."[99] In *Kelo*, the Court relied on two prior holdings to determine whether Connecticut's attempt to condemn the petitioners' houses satisfied the "public use" requirement of the Takings Clause. The two cases the Court relied upon were *Berman v. Parker*[100] and *Hawaii Housing Authority v. Midkiff*.[101]

In *Berman*, the Supreme Court approved a redevelopment plan that specifically targeted a blighted area.[102] *Berman* held that because the disputed property was in a blighted area, the legislature should be able to determine the best "public use," and the Fifth Amendment should not impede the legislature's determination of what constitutes the "best" decision.[103]

Thirty years later, the Supreme Court revisited this holding and

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> Most obviously, [public use] refers to situations in which the property will be used by the government itself to fulfill one of the traditional public functions of government, such as providing a park or highway. Additionally, it may refer to situations in which the property will be operated by a "common carrier," such as a railroad, with an obligation to serve the public. It emphatically did not include situations in which the government transferred property from one private owner to another. Under no possible meaning of the phrase could that be considered taking land "for public use."

Id.

95. *Id.*

96. *Id.*

97. *See Restricting Government Use of Eminent Domain: Capitol Hill Hearing Before the H. Resources Comm., 109th* Cong. (2005) (statement by Bert Gall, Attorney, Institute for Justice) [hereinafter Gall].

98. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2263 (2005) ("[w]ithout exception, our cases have defined [the concept of valid public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.").

99. *See* Gall, *supra* note 97 ("[t]he Court ruled [in *Berman*] that the removal of blight was a public 'purpose,' despite the fact that the word 'purpose' appears nowhere in the text of the Constitution. . . .").

100. Berman v. Parker, 348 U.S. 26 (1954).

101. Haw. Housing Auth. v. Midkiff, 467 U.S. 229 (1984).

102. *See Kelo*, 125 S. Ct. at 2663 (*see generally Berman*, 348 U.S. 26).

103. *Berman*, 348 U.S. at 33

reaffirmed the *Berman* decision in *Midkiff*.[104] In *Midkiff*, the Court approved a land condemnation scheme to seize property to break up an oligopoly because the legislature determined the taking was a legitimate benefit to the public.[105] *Midkiff* held that legislatures should be given deference[106] when deciding whether to condemn land under the Takings Clause. Ironically, however, the Court also noted that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[107]

Today, the scope of what constitutes "public use" is dangerously broad, and religious rights are at risk because the *Kelo* majority did not refrain[108] from increasing the scope of this definition.[109] Instead, the majority paved its notion of a general "public purpose" path once again.[110] In dissent, Justice O'Connor stated:

> In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that a sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased

104. *Midkiff*, 467 U.S. 229.

105. *See id.* at 245.

106. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2664 (2005) (citing *Midkiff*, 467 U.S. at 244).

107. *Midkiff*, 467 U.S. at 245.

108. *See* Ramsey, *supra* note 34:

> The *Kelo* Court did not pretend to base its conclusion upon the words and historical understanding of the Constitution. Instead, it effectively admitted that it was re-writing the key phrase in the Fifth Amendment to produce what it thought was a better outcome. According to the Court, modern needs required it to substitute the phrase "public purpose" for the Constitution's phrase "public use." This would allow the government to seize private land and transfer it to other private parties any time that such transfer would facilitate "economic development," even though neither the government nor the public would end up owing or using the land.

109. *See* Gall, *supra* note 97 ("By effectively changing the wording of the Fifth Amendment, the Court opened Pandora's Box, and now properties are routinely taken pursuant to development statutes when there's absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hopes to increase its tax revenue.").

110. *See* Ramsey, *supra* note 34:

> The *Kelo* decision is an attack, not only upon private property rights, but upon the whole idea of constitutional rights. If a right written into the text of the Constitution can be altered by five members of the Supreme Court simply because they believe that the evolving modern needs of government require it to give away, then we have no fixed rights, but only those rights the Court is willing to accept at any given time.

> tax revenue, more jobs, maybe even aesthetic pleasure.[111]

Justice O'Connor rightfully argues that the majority's holding should have been narrower, because now there are no limits on the words "for public use" and no limitations on the reach of eminent domain.[112]

E. A Trend Leading to Protection: State Deference

States retain the power to determine what property should be subject to governmental takings.[113] The problem with allocating states this power is that the factors determining which land can be taken vary drastically from state to state. Specifically there is variation regarding the use of religious lands and subsequent transfers for economic advancements. However, First Amendment rights do not vary by state and are enjoyed equally by every American citizen.[114]

Therefore, states should consider one or more of the following factors when the land in question is used for religious purposes: (1) Whether moving to a new location will disrupt the operations of the religious organization; (2) Whether the property in question is vital to the organization's continuing existence; (3) Whether there is any symbolic or historical significance to the property; (4) Whether compensation for the displacement of the religious organization is adequate; and (5) What public benefits will occur as a result of the transfer?

A potential for increased abuse regarding the condemnation of religiously-used lands occurs because the *Kelo* majority does not set any limits regarding state eminent domain power. Instead, *Kelo* expands the concept of "public use."[115] Therefore, it is imperative that states enact legislation to protect these religiously-used lands from abusive, economic redevelopment plans. Ultimately, it is their responsibility to protect their citizens' First Amendment rights and to preserve the use of these lands. Some states have initiated their legislative processes to ensure protections against condemnation for economic development exist.[116]

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111. Kelo v. City of New London, 125 S. Ct. 2655, 2675 (2005) (O'Connor, J., dissenting).

112. *See id.* (O'Connor, J., dissenting).

113. *See* U.S. CONST. amend. V. The Fifth Amendment is extended by the Fourteenth Amendment to the states. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 750 (1976).

114. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

115. Kelo v. City of New London, 125 S. Ct. 2655, 2663 (2005).

116. *See* Rich Ehisen, Changes Imminent for Eminent Domain, State Net Capitol J., volume XIII, No. 25, July 18, 2005 [hereinafter Ehisen]:

> Texas became the first state since the decision to actually move legislation when the House unanimously approved [House Joint Resolution] 19, a constitutional amendment that would bar land seizure like that in New

1. The Conservative (and More Desirable) Approach

Several states already have measures to prevent governmental takings for strictly economic advancements[117] in non-blighted communities. For example, the Supreme Court of Michigan recently affirmed that the state's condemning power[118] for public purposes and uses specifically means "for the use or benefit of the public."[119] In *County of Wayne v. Hathcock*,[120] the court held that the condemnation of property for a later transfer to a private entity will be permitted only when the public retains a measure of control over the property,[121] or when the area in question is blighted and the transfer is necessary for redevelopment.[122]

In Michigan, "public use" does not include the taking of property for a subsequent transfer which leads to the construction of businesses owned by private entities.[123] Thus, transfers to private entities that are not subject to public oversight are unconstitutional under state law.[124]

This recent decision overruled *Poletown Neighborhood Council v. Detroit*,[125] which had allowed governmental takings for private economic development projects.[126] *Poletown* authorized the condemnation of approximately 1100 homes, twenty stores, and two churches for the construction of a General Motors manufacturing plant and an increase in the city's tax base.[127] Michigan's approach now ensures protections and safeguards from unconstitutional governmental takings to strictly raise a tax base. It acknowledges the principle of private property and respects the right to private property.

Other states adopted tests to analyze each situation on a case-by-

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London. . . . Several other states—California, Tennessee, Delaware, Florida, Minnesota, and New Jersey among others—have introduced their own eminent domain bills. Several more, including Georgia, Missouri, Alabama, Idaho, New Hampshire, Oklahoma and Virginia are considering similar bills.

117. *See id.* ("At least eight states, including Arkansas, Florida, Kentucky and Maine, already bar using eminent domain as an economic development tool. . . .").

118. *See* MICH. COMP. LAWS ANN. § 213.23 (West 1998); *see also* Mich. CONST. art. X, § 2 (1963).

119. County of Wayne v. Hathcock, 684 N.W.2d 765, 778 (Mich. 2004).

120. *Hathcock*, 684 N.W.2d at 765, *overruling* Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981).

121. *See Hathcock*, 684 N.W.2d at 782.

122. *See id.* at 783.

123. *See id.* at 784.

124. *See id.*

125. Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981).

126. *See id.* at 458.

127. *See* Katherine M. McFarland, *Privacy and Property: Two Sides of the Same Coin: The Mandate For Stricter Scrutiny For Government Uses of Eminent Domain*, 14 B.U. PUB. INT. L.J. 142, 149 (2004).

case basis. For example, Colorado adopted a balancing test, established in *Pillar of Fire v. Denver Urban Renewal Authority,*[128] to balance a governmental taking against a citizen's First Amendment rights.[129] This test weighs the competing interests of the state against those of the religious organization when deciding if an infringement on one's individual First Amendment rights occurred.[130]

In *Pillar of Fire*, the Denver Urban Renewal Authority (DURA) sought to condemn a tract of land which included the Pillar of Fire Church.[131] The Supreme Court of Colorado eventually authorized renewal by DURA[132] because the area in question was so blighted and deteriorated that the entire tract had to be condemned in order to redevelop the land for the public's benefit.[133] Additionally, no alternative means existed to successfully complete the renewal project.[134]

Colorado allows for condemnation of religiously-used properties in blighted areas, but only after a hearing to ensure that there is a substantial public interest in the redevelopment project and that no other reasonable means are available to accomplish the project.[135] In Colorado, the state's interests in implementing urban renewal plans are balanced against citizens' constitutional rights of the First Amendment.[136]

The balancing test established in *Pillar of Fire* was upheld in the *Order of Friars Minor of the Province of the Most Holy Name v. Denver Urban Renewal Authority.*[137] In that case, the Supreme Court of Colorado maintained that courts look at the dispute and then balance the interests involved to determine if the state demonstrated a substantial interest with no reasonable alternatives and finally decide if the state can permissibly and constitutionally seize the religiously-used property.[138] The area planned for renewal must be evaluated as a whole to determine whether the religiously-used land situated on that tract is vital to the "overall renewal plan" and is subject to seizure under the state laws and the Constitution.[139]

This conservative view upholds the Framer's intent and

128. Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250 (Colo. 1973).
129. *See id.* at 1253.
130. *Id.* at 1254.
131. *See id.* at 1250.
132. *See* Pillar of Fire v. Denver Urban Renewal Auth., 522 P.2d 23, 25 (Colo. 1976).
133. *See id.* at 24.
134. *Id.* at 25.
135. *See* Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250, 1253 (Colo. 1973).
136. *See id.* at 1235.
137. Order of Friars Minor of the Province of the Most Holy Name v. Denver Urban Renewal Auth., 527 P.2d 804 (Colo. 1974).
138. *See id.* at 804-05.
139. *See id.* at 805.

fundamental understanding of eminent domain power. The conservative states' perspective to preserve property rights unless there is a governmental necessity to take the land is the more desirable and protective approach.

2. The Liberal (and Less Desirable) Approach

Unfortunately, not all states ensure these protections.[140] Minnesota and Maryland are examples of states that take an expansive and abusive interpretation to the constitutional requirement for "public use."[141] These states do not afford protections to religiously-used lands and their detrimental interpretation of "public use" revolves around their economic agendas.

Minnesota's state constitution authorizes the power of eminent domain. It states "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."[142] However, the Supreme Court of Minnesota has held that when a dispute arises regarding eminent domain condemnations, "[g]reat weight must be given to the determination of the condemning authority, and the scope of review is narrowly limited. If it appears that the record contains some evidence, however informal, that the taking serves a public purpose, there is nothing left for the courts to pass upon."[143] Minnesota takes the view that courts should not interfere with a condemning authority's actions unless they are contrary to law.[144]

This liberal approach was upheld by the Supreme Court of Minnesota in *City of Duluth v. State of Minnesota.*[145] In *City of Duluth*, the court authorized the condemnation of land in order to construct a paper mill which was expected to revitalize the local economy.[146] The court held that the concept of public use should be construed broadly[147] and that the words "public use" are interchangeable with the words "public purpose."[148] As such, the proposed construction of the private

140. *See* Ehisen, *supra* note 116 (noting that "[f]ive states—Kansas, Maryland, Minnesota, New York and North Dakota—currently allow for eminent domain authority to be used for private economic development.").

141. *See, e.g.*, Hous. & Redevelopment Auth. v. Minneapolis Metro. Co., 104 N.W.2d 864 (Minn. 1960); *see also, e.g.*, Prince George's County v. Collington Crossroads, Inc., 339 A.2d 278 (Md. 1975).

142. MINN. CONST. art. 1, § 13 (2005).

143. Hous. & Redevelopment Auth. v. Minneapolis Metro. Co., 104 N.W.2d 864, 874 (Minn. 1960).

144. *See id.* at 873-74.

145. City of Duluth v. State of Minn., 390 N.W.2d 757 (Minn. 1986).

146. *See id.* at 760.

147. *Id.* at 763.

148. *Id.*

entity fulfilled a "public purpose" because it contributed to the city's tax base and created more job opportunities for the area.[149]

The State of Maryland also allows for the condemnation of private property and the subsequent transfer to another private entity based on the justification that resulting economic benefits are "public" in nature.[150] In *Prince George's County v. Collington Crossroads, Inc.*,[151] the Court of Appeals of Maryland held that condemnation of land for the construction of an industrial park satisfied the "public use" requirement.[152] The court determined that the "new job opportunities and new tax ratables"[153] created were the beneficial effect upon the public. That court endorsed the proposition that public use is not synonymous with the public's literal or physical use of the property, or that the government must use the condemned property.[154] Instead, what Maryland and Minnesota courts are doing is holding that if certain members of the public use the land and it increases the tax base, then the land justifies a "public use." This, however, completely disregards the Framers' intent.

Maryland and Minnesota's eminent domain laws do not adequately protect citizens' constitutional rights to the First Amendment. Instead, they provide more protection to private developers. As a result, there are essentially no limits on governmental takings so long as a future economic benefit can be anticipated. Economic benefits from retail stores and private development companies are undoubtedly larger than those created by residences and tax-exempt properties. In this situation, citizens should not only fear losing their houses, but also their churches.[155] The First and Fifth Amendments must be given equal weight, not disproportionate weight.

F. The Future—What Kelo *Actually Means*

Justice O'Connor concluded her dissent by predicting the potential abuses that will occur when the government condemns land and transfers that land to private entities for development.[156] After *Kelo*, religious

149. *See id.*
150. *See id.*
151. Prince George's County v. Collington Crossroads, Inc., 339 A.2d 278 (Md. 1975).
152. *See id.* at 289.
153. *Id.* at 281-82.
154. *See id.* at 284.
155. *See* Ralph Blumenthal, *Humble Church Is at Center of Debate on Eminent Domain*, N.Y. TIMES, Jan. 25, 2006, at A11 [hereinafter Blumenthal] ("It's not just grandma's house we have to worry about . . . [n]ow it's God's house, too.").
156. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting).

organizations fear that their tax-exempt status is no longer a benefit, but instead makes them a prime target[157] for governmental takings. The American Center for Law and Justice warns that "[i]f the government decides a mall would produce more tax income than your home or church, they can now take your home or church."[158]

Recently, in Tulsa, Oklahoma, the frightening vulnerability imposed by the *Kelo* decision has now become a reality.[159] But instead of a Wal-Mart, it is a Home Depot.[160] With legislation on the table,[161] but not yet enacted, the parishioners of the Centennial Baptist Church are seeing the inadequacy of their state's eminent domain laws.[162] City officials are trying to negotiate a deal with the church before it invokes its eminent domain powers to acquire the land on which the church sits.[163] Currently, the church insists on "staying put" and has rejected all offers.[164]

If the city cannot reach a deal, it appears that the state's eminent domain laws—like Connecticut's, which allow for economic development and private transfers—will most likely be invoked.[165] To date, the city has claimed fourteen properties by eminent domain laws; however, seizure of the land that Centennial Baptist Church currently occupies has not been authorized.[166] A local newspaper is calling this "a battle between God Almighty and the almighty dollar."[167]

Tulsa officials are trying to implement a shopping center with stores to foster economic development and to increase the tax base.[168] The mayor has recently stated, "I'm open to anyone telling me how we're going to pay for city services."[169] Building new stores and

157. *See* Ehisen, *supra* note 116.
158. *See id.*
159. *See* Blumenthal, *supra* note 155.
160. *See id.*
161. *See id.*

> Strengthened by a United States Supreme Court ruling last summer that approved the condemnation of private property by New London, Conn., for resale to other private interest for what the court [sic] called "public purpose," municipalities around the country are considering similar forced takings, to a chorus of opposition by local interests and state legislators. Bills to block such seizures are on the docket in Oklahoma and many other states. . . .

162. *See id.*
163. *Id.*
164. *See* Manny Gamallo, *Church Not Included in Condemnation Effort*, TULSA WORLD, May 16, 2006 [hereinafter Gamallo]. *See also* Michael Smith, *The Powers That Be: A Multimillion-Dollar Sand Springs Development Squares Off Against a Church That Refuses to Leave Its Sanctuary*, TULSA WORLD, Apr. 4, 2006.
165. *See* Blumenthal, *supra* note 155.
166. *See* Gamallo, *supra* note 164.
167. Blumenthal, *supra* note 155.
168. *See id.*
169. *See id.*

unsympathetically evicting private land owners is hardly the answer. Unfortunately, it appears that this situation is just the beginning; *Kelo* opened the floodgates[170] on this once "privileged" power.

IV. Conclusion

Justice O'Connor's dissent accurately foreshadowed the danger American citizens now face as a result of the *Kelo* decision. The fundamental right to free exercise of religious worship should not be replaced by the Supreme Court's decision. States should act quickly to protect property rights from the expanding and manipulative definition of "public use" that the Supreme Court recently created. The term "public use" must limit governmental takings, ensuring that takings are constitutional, and not abusive. Churches should be replaced by new churches, not Wal-Marts.

Although the Supreme Court may have inadvertently left states with this potential abuse of power, it is ultimately the states' burden to make sure that the rights guaranteed under the Fifth Amendment and the First Amendment are still upheld. State legislatures and courts should be mindful that the Framers sought to seek limits with the Constitution and placed two specific requirements on the Takings Clause. Therefore, states should not continue to expand the concept of "public use." Instead, states should ensure that "public use" is not manipulated into an improper concept.

The repercussions of what will now constitute "public use" post-*Kelo* will be interesting. The extent to which state legislatures will condemn religiously-used lands will be seen only with time. History has shown a tradition of judicial restraint by courts to condemn religious property. Let's hope this continues. Have the words "for public use" in the Takings Clause of the Fifth Amendment become a nullity? Let's hope not.

170. *See* Gall, *supra* note 97 ("In response to [*Kelo*], there has been an outpouring of public outcry against this closely divided decision. Overwhelming majorities in every major poll taken after the *Kelo* decision have condemned this result.").

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